In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 668

JOSEPH STASSI, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1968. Mr. Justice Black extended the time for filing the petition for a writ of certiorari to and including October 21, 1968, and it was filed

on October 19, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court erred in refusing to inspect *in camera* the grand jury testimony of a State Department representative whose testimony consisted primarily of the identification of various official documents.

2. Whether false statements in support of a motion before a Commissioner to reduce bond pending a removal hearing were material.

3. Whether on the facts of this case, the court of appeals could determine from an *in camera* inspection that certain overheard conversations had no bearing on the instant charges.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Southern District of Florida of having wilfully testified falsely under oath to material matters in a bail bond hearing before a United States Commissioner, in violation of 18 U.S.C. 1621 (R. I, 12-14; R. III, 1285-1286, 1298).[1] He was sentenced to imprisonment for a period of four years and fined $2000 (R. III, 1310-1311).

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[1] The indictment stated verbatim the alleged false statements which, in substance, constituted an unequivocal denial by petitioner that he had ever applied for, obtained or had anything to do with the issuance of a certain passport issued April 10, 1965 in the name of Michael Frank Dorsi.

Petitioner was arrested on January 25, 1966 under a warrant based on an indictment charging violation of the narcotics laws which had been returned in Houston, Texas in March 1963 (R. I, 67-69, 83, 95, 97-98, 103-106, 180-183, 198). On January 26, 1966, petitioner was brought before the United States Commissioner on his petition to reduce bond (set in Texas at $250,000 in 1963) pending completion of removal proceedings (R. I, 164-165, 180-184, 198). He was represented at the hearing by two local attorneys and an attorney from New York (R. I, 181-182). Under oath petitioner testified that he had never applied for any passport under the name of Dorsi and did not have anything to do with such a passport (R. I, 182, 189-193, 199, 222-225, 252-254). The question of a passport was material to the Commissioner's determination of the advisability of reducing bond as requested by petitioner (R. I, 194). About a week later, petitioner waived a removal hearing under Rule 40, F.R.Cr.P. (R. I, 182).

Petitioner does not challenge the sufficiency of the evidence to show that he in fact applied in person for a passport in the name of Michael Frank Dorsi in the office of the naturalization clerk of Hudson County, New Jersey, on April 7, 1965, attaching his picture to the application which he signed in the presence of the clerk. A passport in that name was issued by the State Department and mailed to Dorsi at the address on the application in West New York, New Jersey.

At the trial, the Chief of the Legal Advisory Branch of the Passport Office in the State Depart-

ment, an attorney who was the operational custodian of processing records, identified and explained entries on documentary evidence (passport application and name index card record) made during the internal passport processing procedure (R. I, 430-431, 438-439). He testified that a passport had been issued on the Dorsi application and mailed, explaining the symbols that had been placed on the application to show the year of issuance, the passport serial number and the date of issuance (R. I, 442-444, 447-448; R. II, 471). He also identified and explained entries on a name index card, a record kept in the ordinary course of the business of processing passport applications, which indicated the name of the applicant, his address, the serial number of the passport and the date and time the passport was placed in the mail bags for mailing (R. I, 445-447). On cross-examination (R. II, 471-495), counsel's questions were predominantly directed at the witness' lack of personal knowledge of the Dorsi passport and the possibility that the passport was inadvertently not mailed even though the index card entry indicated otherwise. When it developed that the witness had testified before the grand jury, counsel sought the grand jury minutes. The government had no objection to an *in camera* inspection but the court could not "see any necessity." (R. II, 96).

ARGUMENT

1. The district court did not commit reversible error in refusing to inspect *in camera*, or turn over to the defense, the grand jury minutes of the State

Department employee who testified about the records relating to the mailing of the passport. The witness' testimony had only minor significance in the case, since it bore only on receipt of the passport while the gist of the case against petitioner was that he falsely denied applying for or having anything to do with the Dorsi passport. Moreover, the witness' testimony related to documents kept in the ordinary course of business—an evidentiary category not meaningfully susceptible to impeachment through grand jury testimony,—and defense counsel never purported to show any need for disclosure (R. II, 496). Nothing in *Dennis* v. *United States*, 384 U.S. 855, dispenses with a showing of particularized need made in order to warrant the disclosure of grand jury testimony. See also *United States* v. *Amabile*, 395 F. 2d 47, 52-53 (C.A. 7), petition for a writ of certiorari pending, No. 129, this Term; *United States* v. *Battaglia*, 394 F. 2d 304, 315 (C.A. 7), petition for a writ of certiorari pending, No. 168, this Term; *United States* v. *Youngblood*, 379 F. 2d 365, 367-368 (C.A. 2). Under *Dennis* the trial judge retains the function of "deciding whether a case has been made for production." *Id.* at 875.[2]

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[2] *Allen* v. *United States*, 390 F. 2d 476 (C.A.D.C.), and *United States* v. *Youngblood*, 379 F. 2d 365 (C.A. 2), do not interpret *Dennis* in a manner conflicting with the decision below. Although the Second Circuit in *Youngblood* exercised its supervisory power to require production of grand jury testimony of witnesses "as of right," the court expressly recognized that *Dennis* had not abandoned the "particularized need" requirement (379 F. 2d at 367-370). Accord, *United States* v. *Amabile*, 395 F. 2d 47, 52-53 (C.A. 7). The Court of Appeals for the District of Columbia in *Allen* also recog-

2. For the first time, petitioner urges in this Court that a United States Commissioner presiding over a removal proceeding under Rule 40 of the Federal Rules of Criminal Procedure does not have power to consider a petition for reduction of bail previously set in the district of indictment. On this basis, he contends that false testimony concerning his application for a passport in 1965 was not material to any issue properly before the Commissioner (Pet. 13-17). Rule 40(b)(2) does, however, clearly give the Commissioner power to fix bail pending the determination of the removal hearing. Thus, irrespective of whether the authority to fix bail for appearance conferred by Rule 40(b)(3) empowers the Commissioner to reduce the bail set in the district of indictment, the Commissioner here could act on petitioner's application for reduction of bond during the pendency of the removal proceedings. Petitioner's false statements under oath in support of his application were thus materially false and made before a competent tribunal.

3. After argument in the court of appeals in the instant case and this Court's decision in *Kolod* v. *United States*, 390 U.S. 136 (motion to amend the order of remand reargued *sub nom. Alderman* v.

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nized that *Dennis* retained the requirement that there be a significant need for the grand jury testimony, although it declined to label it as a "particularized need" (390 F. 2d at 481-482). The decision by the Second and Seventh Circuits under their supervisory power to apply a more liberal rule for production of grand jury testimony than is required by *Dennis* does not create a conflict in circuits as to interpretation of *Dennis*.

United States, No. 133, October Term, 1967), the government filed with the clerk of the court of appeals logs pertaining to electronic surveillance in 1962 of a person identified as "Joe Rogers," an alias known to have been used by petitioner. Following the procedure utilized in *Battaglia* v. *United States*, 394 F. 2d 327 (C.A. 7), petition for a writ of certiorari pending, No. 168, this Term, the court made an *in camera* inspection of the logs and found that the conversations recorded were not relevant to the present case, observing that "without question, * * * the conversations in which 'Joe Rogers' participated and were overheard by Government agents are clearly unrelated to the case now before this Court." (Pet. App. B, p. 38).

The issue before the Court in *Alderman* is whether a court may make an *in camera* determination that overheard conversations are so clearly unrelated to the prosecution at issue that they need not be disclosed to the defense or whether in all instances the material must be turned over to the defense. To that extent we assume the Court will wish to defer action on this petition until decision in *Alderman*.

If the initial determination may be made by a court, there would be no reason for a remand of this case to the district court. The overheard conversations took place at least a year before petitioner became a fugitive from the 1963 indictment for narcotics offenses in Texas and well over two years before he applied for the passport in the name of Michael Frank Dorsi in April 1965. The earliest known date that petitioner used the name Michael F. Dorsi was

June 6, 1964 when he ordered a new automobile in that name in Little Falls, New Jersey (R. I, 369-373, 376-377; Gov't. Exh. 11). The prosecution rested primarily on documents within the government's custody. Since the court of appeals had before it a fully transcribed record of the trial it was fully competent to determine relevancy of the monitored conversations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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